

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA
(Previously known as the Motor Dealer Council of B.C.)

**IN THE MATTER OF THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 AND
THE *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 c. 2**

RE:

JOHN NILSSON AND LISA NILSSON

COMPLAINANTS

AND:

**EAGLE RIDGE PONTIAC BUICK GMC LTD
(COQUITLAM)
DL # 8214**

DEALER

DECISION OF THE REGISTRAR OF MOTOR DEALERS

1. On April 16, 2008, a hearing was held before me whereby it was alleged that Eagle Ridge Pontiac Buick GMC Ltd. (Coquitlam), Dealer Number 8214 (“Eagle Ridge”) committed a deceptive act or practice by representing to John and Lisa Nilsson (the “Nilssons”) that a 2006 Buick Rendezvous with VIN 3G5DA03L265566688 (the “Buick”) was equipped with power seats, onstar/parking assist and traction control when the Buick was in fact not so equipped; and representing that the Nilssons received a price benefit from \$42,198.00 to \$28,995.00 on the Buick when they did not; contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the “BPCPA”).

2. Representing Eagle Ridge was Adam Isfeld. The Nilssons did not attend the hearing due to an error on the part of the Motor Vehicle Sales Authority of B.C. (the “VSA”) providing them with the wrong hearing time. By letter dated April 28, 2008, I directed the following procedure in order that the Nilssons have an opportunity to be heard:

- (i) A transcript of the hearing was provided to the Nilssons along with copies of exhibits entered by Eagle Ridge at the hearing.

- (ii) The Nilssons would have 14 days to provide written submissions addressing anything said by Eagle Ridge at the hearing.
- (iii) Eagle Ridge would be given a copy of the Nilssons' submissions along with a transcript of the hearing and would have 14 days to raise any objections to the Nilssons' submissions.

3. At the hearing, the Affidavit of Bill Jost, sworn on February 29, 2008, was entered as Exhibit 1 (the "Affidavit"). Attached to the Affidavit are written statements from the Nilssons: Exhibits A, L, N and O. The Affidavit was provided to Eagle Ridge a few weeks before the hearing along with the Notice of Hearing, which was entered as Exhibit 2. Subsequent to the hearing, Eagle Ridge retained legal counsel, Seema Lal of Shapiro, Hankinson & Knutson, who provided a summary of the evidence and some comments as to the written submission of the Nilssons. I have not found it necessary to rely on that summary or comments.

4. While I may not comment on all the evidence and oral and written testimony provided during this hearing, I have reviewed all that evidence and oral and written testimony and given it all the appropriate consideration and weight.

THE FACTS

5. This particular case revolves on its facts.

6. On November 5th, 2006, the Nilssons attended at Eagle Ridge to look at and test drive vehicles. They were not interested in new vehicles: (p. 1 of Exhibit A to the Affidavit). "After many hours of car shopping, Dan Thistlethwaite, salesman at Eagle Ridge, told us about a 2006 Buick Rendezvous that had just returned on lease": Exhibit N of the Affidavit, page 66. The Buick could not be fully shown as the keys were locked up in service and Eagle Ridge was closing soon. The Nilssons stated that Thistlethwaite showed them a "build sheet" for the Buick although they state they found it confusing. Thistlethwaite stated he went over the "build sheet" in detail with the Nilssons. I would note that Lisa Nilsson provided the VSA with an on-line build sheet for a 2007 Buick Rendezvous in support of their case that the Buick was over-priced: Exhibit L of the Affidavit pages 39-42 and Exhibit N of the Affidavit pages 68 to 70.

7. That same evening, Thistlethwaite and the Nilssons sat down and worked out the numbers on the Buick. They reached an agreement which was subject to a test drive by the Nilssons. Thistlethwaite was to bring the Buick out to the Nilssons for that test drive.

8. On November 6, 2006, Thistlethwaite brought the Buick to the Nilssons for the test drive. The Nilssons state, “[r]ight away John and I noticed that it didn’t have the features we were expecting (power seats, onstar, parking assist). We had this expectation based on what Daniel told us, and what options a 2006 Rendezvous with a retail value of \$42,000.00 would have”: p. 1 of Exhibit A to the Affidavit. In their written submission dated May 27, 2008, John and Lisa Nilsson state:

In response to page 12 lines 4 through 6 [of the transcript]. We were told by Dan the night we signed the paperwork prior to a test drive that it had the missing options. The night he brought it for the test drive we discussed all of the missing options with him, the traction control in detail. Dan argued with us that the vehicle had traction control when in fact it does not. We also discussed the fact that we did not feel that this vehicle was worth \$42,198 new and that we felt misled and unhappy. He flatly denied saying it was worth that new.

9. The Nilssons also claim the price they paid for the Buick was higher than it should be. They provide as evidence the on-line build sheet for a 2007 Buick Rendezvous, being a year newer and they state, “[w]e feel as a volume dealership they would be able to purchase a new Rendezvous for the sticker price on the Rendezvous they sold us”: Nilssons’ written submission dated May 27, 2008. The Nilssons state that on the day they agreed to purchase the vehicle, subject to a test drive, they researched the Buick online: “[a]rmed with the options Dan said the vehicle had and the fact that he quoted it as being worth \$42,198, we tried to recreate the vehicle on the GMC site. No matter how many options we added including all-wheel drive we were unable to come close to reaching \$42,198.” I would note that the Nilssons provided a GMC website printout showing a 2007 Buick Rendezvous and not a 2006 model: Exhibit N to the Affidavit, pages 68-70.

10. The Nilssons state they agreed to keep the vehicle for a week. The Nilssons claim Thistlethwaite stated if they were not happy, they could return the Buick and unwind the deal and get a full refund. The Nilssons state that they did return the Buick and Eagle Ridge did not honour its promise to unwind the deal. However, the Nilssons also state: “I told him [Dale Isfeld] the whole story up to that point and that we felt we should get the vehicle we agreed to purchase

or the difference in cash. (\$ 6,000.) I also told him that we felt that they should be giving a public apology”: p. 2 of Exhibit A to the Affidavit.

11. In Thistlethwaite’s written statement dated December 19, 2006, (Exhibit H to the Affidavit) he said he informed the Nilssons of Eagle Ridge’s return policy and that an exchange could be made value-for-value and that he never said they could unwind the deal. I would note that this is consistent with the written statement of Bob Strain dated December 16, 2006: Exhibit J to the Affidavit. Mr. Strain also states that Eagle Ridge offered a trade for a Grand Cherokee which the Nilssons declined. He states: “Mrs. Nilsson declined the offer and wanted Mr. Isfeld to pay her six thousand dollars and print a letter in the local paper saying we were ‘liars’.” The Sales Manager at the time, Jeff Hokanson, stated in his written statement of December 18, 2006, (Exhibit I to the Affidavit) that when he spoke with Mrs. Nilsson, after the sale and trying to negotiate an exchange of vehicles, that they “wouldn’t do a deal without a written apology in the newspaper.” The demand for a public apology is consistent on all the evidence.

12. In their initial written complaint, Lisa Nilsson states: “[w]e never disliked the vehicle but feel it was misrepresented to us. We feel that customers should be treated better and that a salesman [sic] should not be permitted to misrepresent a vehicle in order to line his pockets”: p. 5 of Exhibit A to the Affidavit.

13. The Buick remains in the possession of the Nilssons and they have been making payments on the vehicle. Exhibit O to the Affidavit highlights what the Nilssons are claiming. They believe that they are owed \$6,725.45 based on the following:

Eagle Ridge’s claimed worth for the Buick when new:	\$42,198.00
The value the Nilssons believe the Buick was worth new:	- \$33,250.00
Subtotal	\$8,678.00
Depreciation	X .775
Total Claim	\$6,725.45

Alternatively, the Nilssons claim:

Power heated seats	\$1,500.00
Onstar/parking assist	\$1,605.00
Traction Control	\$285.00
Sub-total for the missing options	\$3,390.00
Amount for misrepresentation (misrepresentation, lost wages, travel expenses for promises not honoured, and the car proof report obtained on their own)	\$2,500.00
Total being claimed	\$5,890.00

14. The Nilssons' dollar figures for the options come from the build sheet for the 2007 Buick Rendezvous they supplied: Exhibit L to the Affidavit. Eagle Ridge stated that if any compensation should be give to the Nilssons, it should not be the cost of the options on a new vehicle but their depreciated value as the Buick was sold used and not new. Eagle Ridge noted that the Buick held 70% of its new value at the time of sale to the Nilssons, so that if any compensation is due, it should only be \$2,373.00: Exhibit 4 at the Hearing. Eagle Ridge says there is no proof of loss in order to substantiate the \$2,500.00 amount claimed for misrepresentation. The Nilssons state they had to travel from Surrey to Eagle Ridge in Coquitlam on a few occasions and took time off work to do so.

THE LAW

(i) Deceptive Act or Practice

15. Section 5(1) of the BPCPA prohibits a supplier of goods conducting a consumer transaction from committing a deceptive act or practice. This section would apply to Eagle Ridge. Under Section 4(3) of the BPCPA, the B.C. Legislature has deemed certain conduct to be deceptive acts or practices. The Notice of Hearing identifies two such sections in issue here which state:

4(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(a) a representation by a supplier that goods or services

(i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

(c) a representation by a supplier about the total price of goods or services if

(i) a person could reasonably conclude that a price benefit or advantage exists but it does not,

16. The case law provides guidance in the application of these provisions. In *Rushak v. Henneken Auto Sales & Service* (1991), 59 B.C.L.R. (2d) 250, (C.A.), the BC Court of Appeal reviewed deceptive acts or practices under the *Trade Practice Act*, which has since been replaced by the BPCPA. In *Rushak*, the Court considered whether the conduct of the Motor Dealer Henneken was a deceptive act and determined it was. From *Henneken* the following principles emerge:

- a. a deceptive act or practice need not be intentional, may be inadvertent and may arise even if the supplier has an honest belief in the accuracy of the information it relays;
- b. a deceptive act is one “that tends to lead a person astray into making an error of judgment;”
- c. the Act must be construed so as to protect not only alert potential customers, but also those who are not alert, are unsuspecting and are credulous; and
- d. the Act imposes a high standard of candour on a supplier of goods.

17. In *The Consumers' Association of Canada et al. v. Coca-Cola Bottling Company et al* 2006 BCSC 863; additional reasons 2006 BCSC 1233 (B.C. Supreme Court); affirmed by 2007 BCCA 356 (B.C. Court of Appeal); leave to appeal to the Supreme Court of Canada refused (December 20, 2007, S.C.C. File No. 32248, 2007 CanLII 66731), Russell J. treated the deceptive act provisions of the *Trade Practices Act* and the BPCPA as the same and applied *Rushak* to her ladyship's consideration of a deceptive act or practice under the BPCPA. Thus the principles in *Rushak* have application under the BPCPA.

18. In *Consumers* Madam Justice Russell stated that the misrepresentation must have led the consumers into making an error of judgment before they would be captured by section 5(1) of the BPCPA. Simply said, if the representations were not believed or not acted upon, there has been no deception:

In oral submissions, plaintiffs' counsel argued that “capability” is all that is required for a successful claim under the Act. While I agree that the statutes impose a “high standard of candour” on suppliers (*Rushak v. Henneken* (1991), 84 D.L.R. (4th) 87, 59 B.C.L.R. (2d) 250 (C.A.) at para. 17), it defies common sense to suppose suppliers will always be found liable for any consumer misapprehension. In my view, such a literal interpretation of the

provision would permit a deceptive act or practice claim to arise from nearly any representation, given the potential for imperfect understanding whatever words are used.

The cases provided by the plaintiffs themselves, as well as those provided by the defendants, establish that a deceptive act or practice “is one that tends to lead [a] person astray into making an error of judgment”: *British Columbia (Director of Trade Practices) v. Household Finance Corp.*, [1976] 3 W.W.R. 731 at 736, 29 C.P.R. (2d) 232 (B.C.S.C.); *aff’d*, [1977] 3 W.W.R. 390, 33 C.P.R. (2d) 284 (B.C.C.A.). Here, there is no evidence that any consumer has been or may have been led into making an error of judgment because of any representation regarding the CRF.

(ii) Onus of proof

19. Under Section 5(2) of the BPCPA, the onus is placed on the dealer to show that the alleged deceptive act or practice did not occur:

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

20. This is a reverse onus provision, but that reverse onus only applies to the deceptive act or practice. As for any damages suffered by the Nilssons, the “[o]rdinary principles of litigation put the burden of proof on the party making the assertion”: *WIC Radio Ltd. v. Simpson* 2008 SCC 40 at paragraph 30 (Supreme Court of Canada). This means that the Nilssons must substantiate any damage claims they advance with some acceptable and credible evidence.

(iii) Assessing the evidence

21. As already stated, this case revolves on its facts. It is therefore important to review the evidence and consider both the internal and external consistencies in the evidence. Internal consistency means the consistency of a witness’s evidence over time and under cross examination. External consistency means that the witness’s evidence is consistent with other evidence from other witnesses and/or documents. Also, all the evidence must be considered as a whole and applying common sense. This was recently stated by Judge Woods in *R v. MSB* 2008 BCPC 181:

[34] While it comes from a civil decision, I find that a passage in a venerable case called *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) provides helpful guidance for assessing the credibility and internal and external consistency of witness testimony. In that case, O’Halloran J.A. said this at p. 357:

...the real test of the truth of the story of a witness...must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable.

DISCUSSION

22. There are three issues to decide in this matter:

- (i) Did Eagle Ridge misrepresent to the Nilssons the Buick's options, such that the Nilssons made an error of judgment?
- (ii) Did Eagle Ridge misrepresent the vehicles price benefit; off-lease compared to new, such that the Nilssons made an error of judgment?
- (iii) Did Eagle Ridge misrepresent that the Nilssons could return the Buick for a refund, such that the Nilssons made an error of judgment?

(i) Did Eagle Ridge misrepresent to the Nilssons the Buick's options, such that the Nilssons made an error of judgment?

23. On the Nilssons' own evidence, they admit being shown the build sheet for the Buick the evening they signed the agreement. They say it was not properly explained or they were confused: May 27, 2008, written submissions of the Nilssons. However, there is no evidence that the Nilssons asked Thistlethwaite to re-explain things or that they communicated to him their confusion. As Russell J. stated in *Consumers*, supra:

...it defies common sense to suppose suppliers will always be found liable for any consumer misapprehension. In my view, such a literal interpretation of the provision would permit a deceptive act or practice claim to arise from nearly any representation, given the potential for imperfect understanding whatever words are used.

24. The Nilssons' evidence also says that upon delivery of the Buick, "[r]ight away John and I noticed that it didn't have the features we were expecting (power seats, onstar, parking assist). We had this expectation based on what Daniel told us, and what options a 2006 Rendezvous with a retail value of \$42,000.00 would have": p. 1 of Exhibit A to the Affidavit. This shows an understanding of the Buick based on the Nilssons own admitted prior research.

25. I also note that somewhat contrary to being confused about the "build sheet," the Nilssons were able to provide a build sheet of their own from the GM website for a 2007 Rendezvous in

support of their position. The Nilssons statement of November 7, 2007 (Exhibit O to the Affidavit) states in part:

...Armed with the options Dan said the vehicle had and the fact he quoted it as being worth \$42,198 we tried to recreate the vehicle on the GMC site. No matter how many options we added including all wheel drive we were unable to come close to reaching \$42,198. When Dan brought the vehicle out to us for a test drive, it was an instant disappointment as it was not only missing the options he told us it had but was clearly not worth anywhere near what he claimed it to be...

26. The Nilssons own evidence shows that they determined the vehicle had the missing options the evening the vehicle was delivered for a test drive. Instead of declining the vehicle, as they were allowed to due to the subject to test drive condition, they instead agreed to keep the vehicle for a further week. In law, the Nilssons waived their protection of that "subject-to" clause. The Nilssons clearly did not believe the vehicle had the options they said were represented to them. In accordance with the decision in *Consumers*, supra, any representation as to the Buick's options was not believed by the Nilssons before they waived the subject-to clause and cannot be the cause of them having kept that vehicle.

(ii) Did Eagle Ridge misrepresent the vehicles price benefit; off-lease compared to new, such that the Nilssons made an error of judgment?

27. The Nilssons state they were showed a document whereby Eagle Ridge represented that the Buick was about \$42,000.00 retail. Exhibit F to the Affidavit is an Eagle Ridge worksheet noting "*was 42,198.00 retail." I would note that the form does not say "plus taxes and fees." The Nilssons supplied a build sheet of their own from the GM website for a 2007 Rendezvous. They could not go back a year on the website: Exhibit L of the Affidavit. It is to be remembered that this is an attempt by the Nilssons to ascertain what a new 2006 Buick Rendezvous would be worth. The Nilssons arrive at a figure of \$33,520. There are some concerns with that number.

28. First, the Nilssons have crossed off the \$1,220.00 destination charge saying it is not applicable. If it is a new vehicle and a destination charge applies, it stands to reason it would be part of the price of a new vehicle.

29. Second, the Nilssons could not obtain a price for the leather package and arrived at a \$700.00 value which "John got the figure of \$700.00 for the leather seats from a different area of

the GM site...”: Exhibit L of the Affidavit. There is no document to show where this number came from.

30. Third, the Nilssons are comparing a 2007 model with a 2006 model. That the retail value of a new 2007 Buick Rendezvous is somehow comparable to the retail value of a new 2006 Buick Rendezvous is an assumption and not evidence.

31. Finally, the Nilssons state: “The Build [sic] price we submitted for this vehicle was only slightly higher than Eagle Ridge’s sale price on an ex-lease used vehicle. We feel as a volume dealership they should be able to purchase a new Rendezvous for the sticker price on the Rendezvous they sold us.” Again, this is mere speculation on the part of the Nilssons. There is no evidence of the price that Eagle Ridge could obtain a new 2006 Buick Rendezvous from GM for.

32. In contrast, Eagle Ridge has provided a build sheet for a 2006 Buick Rendezvous: Exhibit K. When you review the options and numbers provided by Eagle Ridge, they arrive at a value of \$42,194.20 for a 2006 Buick Rendezvous which is close to the \$42,198.00 noted above. I would note the breakdown as follows:

Total on the computer printout with all options as noted and a destination charge:	\$37,595.00
Option Adjustment	-\$550.00
Documentation	\$295.00
GST	\$2,240.40
PST	\$2,613.80
TOTAL	\$42,194.20

33. With the option adjustment, Eagle Ridge’s printout places a new 2006 Buick Rendezvous at \$37,045.00 before taxes. The Buick was sold to the Nilssons for \$28,995.00, before trade-in and taxes, which is \$8,050.00 less. It is to be noted that the Buick was a 2006 model, being sold used in November 2006 and it had 67,656 km on it. Also to be noted is that Eagle Ridge did in fact charge a \$295.00 documentation fee.

34. As to taxes, freight or levy, the Nilssons state, “[t]he retail price of an item never includes these charges.”: written submission of the Nilssons dated May 27, 2008. This is again an assumption without evidence. Some dealers quote the retail price of a vehicle, as an “all in” price meaning taxes, destination charges, and other charges all included. This practice is probably due to the requirements of section 21 of the *Motor Dealer Act Regulation* requiring a dealer to include the cost of PST and any extra costs the purchaser is responsible for when it makes a written representation of the price of a new vehicle.

35. Considering all the above evidence and weighing it against all the probabilities, I find it more likely than not that the Nilssons have misapprehended the retail price of a 2006 Buick Rendezvous based on errors in their research and assumptions they have made. In accordance with Russell, J.’s decision in *Consumers*, supra, I do not find that this misapprehension was caused by Eagle Ridge and it is therefore not a deceptive act or practice.

(iii) Did Eagle Ridge misrepresent that the Nilssons could return the Buick for a refund, such that the Nilssons made an error of judgment?

36. When the Nilssons waived their subject-to protection, it is inferred that they did so on the assurance from Thistlethwaite that if they did not like the Buick after a week of driving it, they could return it to the dealer for a full refund. The Nilssons further claim that both Dale Isfeld and Jeff Hokanson had said they could undo the deal, but when they did try to return the Buick a week later, they were told they could only trade it for another vehicle: Exhibit A to the Affidavit.

37. Thistlethwaite stated he never made such a promise and that he explained to the Nilssons the return policy of Eagle Ridge, which is they could trade the Buick for another vehicle, value-for-value: Exhibit H to the Affidavit. This exchange policy is supported by the written statement of Jeff Hokanson: Exhibit I to the Affidavit. Bob Strain, Sales Manager at Eagle Ridge, also stated the same exchange policy and that Dale Isfeld, General Sales Manager, offered the Nilssons a straight trade for a Grand Cherokee which was declined. The Nilssons admit that they were offered the Cherokee: Exhibit A to the Affidavit.

38. In Exhibit A of the Affidavit, the Nilssons set out a chronology of events. The Nilssons entry of Wednesday November 14th states:

...I told him [Dale Isfeld] the whole story up to that point and that we felt we should be getting the vehicle we agreed to purchase or the difference in cash. (\$ 6,000). I also told

him that we felt that they should be giving a public apology. He told me that would not be happening, but if we wanted we could exchange the Rendezvous for a Jeep Cherokee. As we liked the Rendezvous in general, and we no longer wanted or trusted doing business with them I told him we were not interested...

39. At this point, it does not look as if the Nilssons were interested in reversing the deal, but only in paying less for the Buick, as they perceived they paid too much.

40. The Nilssons Statement goes on to say:

...He [Dale Isfeld] then told me [Mrs. Nilsson] if we really didn't want the vehicle that we could just undo the deal. He told me we had to decide if we wanted to keep the vehicle as he felt we got a good deal, or bring back and undo the deal. I told him I would have to talk to John. The phone then went to a dial tone, and I just assumed that we were having phone problems. As the conversation was over I didn't feel the need to call him back...

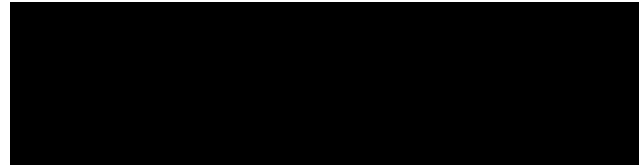
41. Dale Isfeld apparently called back sometime later, told Mrs. Nilsson that he was going to Winnipeg and left her his cell phone number. The next entry is November 18th, some 3 days after this conversation, where they say they called the dealer to unwind the deal. Applying some common sense; if the Nilssons indeed wanted to return the Buick, why would Mrs. Nilsson need to talk to her husband John? Why, after keeping the vehicle for a week, would they take several more days to decide whether or not to return the Buick? On the last page of Exhibit A, the Nilssons state: "[w]e never disliked the vehicle but feel it was misrepresented to us..." This seems somewhat inconsistent with their statement of November 7, 2007, (Exhibit O) where they say the Buick "...was an instant disappointment..." I find that on a whole, there are internal inconsistencies with the Nilssons evidence on this point. I find none in the evidence of Eagle Ridge.

42. In weighing the probabilities and considering the evidence as a whole, it is more likely than not that the Nilssons chose to keep the Rendezvous for the week as they liked the vehicle and hoped to get the price reduced. Even if I was to accept that Thistlethwaite stated that the Nilssons could return the Buick and undo the deal, it is my finding that such a representation would not have any material influence on the Nilssons' decision to keep the Buick the extra week. As such, it cannot be said any representation made by Eagle Ridge regarding unwinding the deal led the Nilssons into making an error of judgment by waiving the subject-to clause.

43. Having found no deceptive act or practices as defined by the BPCPA and as applied by the courts, the Nilssons' claim against Eagle Ridge is dismissed.

44. Pursuant to sections 155(7), 166(2) and 181 of the BPCPA, an application for reconsideration of this determination may be made within 30 days of receiving this determination. Such an application must provide new previously unavailable evidence, and/or identifying an error or other grounds for the reconsideration. Such a request must be made in writing and directed to Denis Savidan, Manager of Compliance and Investigations, Motor Vehicle Sales Authority of B.C., #150 – 6400 Roberts Street, Burnaby, B.C., V5G 4C9.

Dated: July 25, 2008



Ian Christman B.A., LL.B.